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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1965

No. 1206

WALTER JOHNSON, individually and as Secretary-Treasurer of DEPARTMENT STORE EMPLOYEES UNION, LOCAL 1100, an unincorporated association, on behalf of himself and all its members, and WILLIAM SILVERSTEIN, individually and as Secretary-Treasurer of RETAIL SHOE & TEXTILE SALESMEN'S UNION, LOCAL 410, an unincorporated association, on behalf of himself and all its members,

Petitioners,

vs.

RAPHAEL WEILL & CO., INC., d/b/a THE WHITE HOUSE, et al.; JOHN M. ENGLAND, C. E. STROBEL, and WALTER J. HEMPY, as Trustees in Bankruptcy of Raphael Weill & Co., Inc.,

Respondents.

PETITIONERS' REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

It is clear beyond doubt that the National Labor Relations Act, as amended (61 Stat. 137 (1947) 29

U.S.C. § 151) is applicable to trustees in bankruptcy. A trustee in bankruptcy is defined as a person governed by the terms of the Act by Section 2(1) thereof (29 U.S.C. § 152(1)) and is, therefore, an employer against whom actions may be brought under Section 301 (29 U.S.C. § 185). Section 2(2) of the Act (29 U.S.C. § 152(2)) defines an employer as including all "persons" bound by the Act, whether they be "one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers" (29 U.S.C. § 152(1)). The employer definition is specific in its exclusions from employer status, and such exclusions do not embrace trustees in bankruptcy.

In view of the express applicability of the National Labor Relations Act to trustees in bankruptcy, it is manifest that suits to compel arbitration pursuant to the terms of collective bargaining agreements may be instituted notwithstanding the advent of bankruptcy proceedings. Trustees in bankruptcy are creatures of the Bankruptcy Act (30 Stat. 544, as amended, 11 U.S.C. § 1), and do not exist until the provisions of the Bankruptcy Act come into play.

Therefore, the decisions cited by petitioners in their Petition for a Writ of Certiorari, reflecting judicial recognition of the principle that Congress has the power to vest in other forums jurisdiction over certain proceedings which may arise in the course of bankruptcy proceedings and the power to *require* that the bankruptcy court *qua* bankruptcy court surrender its

jurisdiction to those other forums, are plainly controlling.

The United States Court of Appeals for the Ninth Circuit has placed great reliance upon the decision of the United States Court of Appeals for the Sixth Circuit in *In the Matter of Muskegon Motors Specialties Co.*, 313 F. 2d 841, as supporting its conclusion that the Bankruptcy Court need not surrender its jurisdiction in favor of arbitration. The case is both erroneous and inapposite. It is erroneous in view of the express applicability of the National Labor Relations Act to trustees in bankruptcy (29 U.S.C. § 152(1) and (2)) and in view of the importance of arbitration of controversies which survive the cessation of the employer's operations.[1] See *Republic Steel v. Maddox*, 379 U.S. 650; *Goodall-Stanford, Inc. v. United Textile Workers* (C.A. 1, 1956), 233 F. 2d 104; *United Furniture Workers v. McCoy-Couch Furniture Mfg. Co.*, (E.D. Ark., 1963), 223 F. Supp. 880. It is inapposite because it involved union claims in the federal district court that the court, *in its capacity as bankruptcy court*, should have *surrendered* its jurisdiction *qua* bankruptcy court in favor of arbitration. Those are not the claims herein. Petitioners seek to enforce the Congressional intent manifested in the National Labor Relations Act, as amended, in providing the state

[1]It should be noted also that the Court of Appeals in *Muskegon*, supra, relied upon state court decisions in Michigan holding that employees had no claim for vacations against an employer who had gone out of business prior to the vacation rights becoming fixed, thus passing on the merits of the arbitration claim, contrary to the principles enunciated by this Court in *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574.

courts and federal courts (not sitting as bankruptcy courts) as forums for the securing of available remedies, including arbitration, for violation of collective bargaining agreements. In short, petitioners submit that the application of the National Labor Relations Act, as amended, to trustees in bankruptcy, is a clear expression of Congressional intent to permit the parties to collective bargaining agreements to secure full effectuation of those agreements and the national labor policy manifested in the Act through the institution of suits against trustees in bankruptcy in both state and federal courts to enforce those agreements, including provisions for arbitration, under state statutes and Section 301 (29 U.S.C. § 185). There is, therefore, no question in this case concerning the *discretion* of the federal court *qua* bankruptcy court to surrender its jurisdiction in favor of another forum. Congress has made it clear that trustees in bankruptcy can be *required* to submit to arbitration pursuant to the terms of a collective bargaining agreement.

Both respondents and the Court of Appeals for the Ninth Circuit express great concern for the rights of other creditors of the bankrupt. Such rights, we are told, will not be protected by proceedings in arbitration and these other creditors, therefore, will stand to gain or lose. This concern is unfounded. To the extent that the Union's claims under the collective bargaining agreement have priority (or do not have priority) over other creditors' claims under the bankruptcy laws, the Bankruptcy Court itself will so find. To the extent that the Unions' claims involve the express

trust established by agreement between the now-bankrupt employer and the Unions, it is clear that the other creditors have no interest whatever in these assets since trust assets never become part of the bankrupt's estate over which the Bankruptcy Court exerts jurisdiction and against which the creditors may satisfy their claims. *Stickney v. General Electric* (C.A. 4, 1930), 44 F. 2d 362; *In re Brainerd Hotel Co.* (C.A. 2, 1935), 75 F. 2d 481; *In Re Interstate Pipe Co.* (D.C. Pa., 1926) 15 F. 2d 61.

With respect to the question of removability, it should be emphasized that petitioners exercised, in the State Superior Court, their *state-created* right to compel a party to a collective bargaining agreement to submit to arbitration disputes arising under that agreement. The basis for the exercise of this right is a state statute, to wit, Sections 1280 et seq. of the Code of Civil Procedure of the State of California.[2] This is a right clearly provided them by decisions of this Court interpreting Section 301 of the National Labor Relations Act, as amended. See *Dowd Box v. Courtney,* 368 U.S. 502. Clearly, petitioners exercised a *state-created* right. The fact that federal substantive law applies to suits brought in state courts, *Textile Workers Union v. Lincoln Mills,* 353 U.S. 448, and *Teamsters Union v. Lucas Flour Co.,* 369 U.S. 95, does not nullify the character of petitioners' state action or change it from a state cause of action to a federal one. These decisions simply impress upon

[2]The terms of the relevant statutory provisions under which petitioners brought their suit in the state court are set forth in the Petition for Writ of Certiorari.

the States the requirement that national labor policy be paramount even in suits brought in State Courts and that state law must conform to this policy, manifested by Congress in the National Labor Relations Act, as amended (29 U.S.C. § 151 et seq.) To the extent that state law does not conform to national labor policy, it will not stand. Respondents urge that the above-cited decisions stand for the proposition that there is no state cause of action for breach of a collective bargaining agreement. If this is the case, California's statutes, under which petitioners instituted their suit in the State Superior Court, have no meaning or validity. Surely, this Court's decision in *Dowd Box v. Courtney,* 368 U.S. 502, which permits parties to collective bargaining agreements to institute suits in state courts, cannot be read in such a patently contradictory fashion. It cannot be doubted that the intent of Congress in enacting Section 301 (29 U.S.C. § 185) was clearly to provide an *additional forum* for the institution of suits of this kind, and was by no stretch of the imagination designed to supplant the exercise by the states' courts of their traditional jurisdiction over suits for violations of collective bargaining agreements.[3]

The decision of the Ninth Circuit Court of Appeals in this case has the serious consequence of depriving the states of any meaningful method of procuring the satisfactory resolution of labor disputes within their geographical borders. The interest of the States and

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[3]See the Court's discussion of the Congressional debate in *Dowd Box v. Courtney,* supra, at page 512.

their citizens in the stability of industrial relations and the maintenance of industrial peace is at least equal to that of the federal government. State statutes have traditionally been utilized as means for achieving the stability so necessary and desirable in labor-management relations and are critically important tools for the achievement of federal and state goals. The decision below granting removal of this cause to the federal court clearly operates to nullify state interest and goals. Such a result was not contemplated by Congress when it provided, by the enactment of Section 301 of the National Labor Relations Act, as amended, the parties to collective bargaining agreements with *additional* means, in the federal courts, for the enforcement of their agreements.

The critical issue herein with respect to the propriety of removal of petitioners' suit to the federal court depends upon whether, under Section 1441(b) of the United States Removal Statute (28 U.S.C. § 1441(b)), it is one "arising under" the Constitution, treaties or laws of the United States. The courts have uniformly held that it is not enough to support removal that a question of federal law may be involved in the suit in the state court, or even that federal principles may have applicability. See *Huckins v. Duval County, Florida* (C.A. 5, 1960), 286 F. 2d 46; *Shelby County, Tennessee v. Fairway Homes, Inc.* (C.A. 6, 1961), 285 F. 2d 617; *Martinez v. Southern Ute Tribe* (C.A. 10, 1959), 273 F. 2d 731; *Jefferson v. Gypsy Oil Co.* (C.A. 8, 1928), 27 F. 2d 304; *International Ass'n of Machinists v. United Aircraft Corp.*

(C.A. 2, 1964), 333 F. 2d 367; *Meyerhoff v. Garten* (D.C. Maryland, 1964), 232 F. Supp. 363; *John Hancock Mut. Life Ins. Co. v. United O. & P. Workers* (D.C., N.J., 1950), 93 F. Supp. 296 and the decisions cited in the Petition for Writ of Certiorari.

It is, therefore, clear that petitioners' suit is not one "arising under" the Constitution, treaties or laws of the United States and removal to the federal district court was improper.

There are many very important and unresolved questions presented by this case, questions which we respectfully submit cry out for review and resolution by the Supreme Court. The Petition for a Writ of Certiorari should be granted.

Dated, San Francisco, California,
May 11, 1966.

Respectfully submitted,
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